PREME COURT, U. S.

Supreme Court, U.S.
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# IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 6761

JAMES DUDLEY,
*Petitioner*

vs

UNITED STATES OF AMERICA
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

**ATTORNEYS FOR PETITIONER:**

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Constitutional provisions:

Sixth Amendment

Title 28, Section 1254 (1), U.S. Code

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1970

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No.

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JAMES DUDLEY,
*Petitioner*

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UNITED STATES OF AMERICA,
*Respondent*

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES FIFTH CIRCUIT COURT OF APPEALS

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TO THE HONORABLE, THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, James Dudley, prays that a Writ of Certiorari be issued out and under the seal of this Court to review the judgment and opinion of the United States Fifth Circuit Court of Appeals entered in this case on the 17th day of July, 1970, which affirmed the conviction of Petitioner by a jury in the United States District Court for the Northern District of Alabama, for the crime of receiving and concealing a specified quantity of United States Postal Money Orders and a money order issuing machine knowing they had been stolen during an armed robbery of a postal custodian, contrary to the provisions of 18 U.S.C. 641, with a resulting sentence of three years imprisonment.

An application for rehearing to the Fifth Circuit Court of Appeals was denied by that Court on August 10, 1970.

## Opinions Below

The opinions of the Fifth Circuit Court of Appeals was a summary one and is reported at Fed. 2d (July 17, 1970). No opinion was written by the Court of Appeals in denying the application for rehearing filed therein.

## Jurisdiction

The judgment of the Fifth Circuit Court of Appeals was entered on July 17, 1970. (Appendix A, p. A). A timely petition for rehearing was filed and denied on August 10, 1970. A stay of mandate was granted on August 25, 1970, so that the matters and things contained herein could be reviewed by this learned Court.

The statutory provision believed to confer on this court jurisdiction to review the judgment in question is 28 U.S.C. 1254.

## Question Presented for Review

Whether or not the failure of the trial court to allow the jury to determine the value of the stolen property in question, where the evidence of such value was not strong and where valuation was *the* decisive factor in deciding whether or not the offense charged was a felony or a misdemeanor, denied the petitioner his constitutional right to a *complete* trial by jury under the Sixth Amendment to the United States Constitution.

## Constitutional Provision Involved

The Sixth Amendment, United States Constitution, in part:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed . . ."

## Statement of The Case

Petitioner Dudley was convicted of a violation of Title 18, Sec. 641 of the United States Code which proscribed the receiving or concealing of any ". . . thing of value of the United States or any department or agency thereof. . .". Section 641, *supra*, then goes on to subdivide the offense in question into two grades of greater or lesser severity depending exclusively upon the value of the stolen property in question:

> "Shall be fined not more than $10,000 or imprisoned not more than ten years or both; *but if the value of such property does not exceed the sum of $100, he shall be fined not more than $1,000 or imprisoned not more than one year or both.*" *(emphasis added)*

The code section under consideration then goes on to define the word "value" as meaning the face, par or market value or cost price of the items or item in question, either wholesale or retail, whichever is greater.

The indictment in the instant cause charged the Appellant-Petitioner solely (one count) with receiving and concealing some 500 money orders and a postal money order issuing machine which were alleged to have a value in excess of $100.

Following the Court's charge, the defendant was convicted and then sentenced to three years imprisonment.

The trial court, in its charge, not only failed to submit the issue of the value of the stolen property to the jury but also, in point of fact, absolutely and unequivocally precluded them from any such consideration by his instructions and then *himself* decided that under the evidence the accused, your petitioner should be adjudged guilty of the greater wrong and sentenced to three years. We quote the relevant portions of the Court's charge in this regard:

> "Forms of verdict have been prepared for your convenience: *there are only two possible forms of verdict in this case; there is one count in the indictment and you will find the defendant either guilty or 'not guilty.'" (T. 307) (emphasis added)*

During the trial, the government had adduced *some* proof relative to the value of the issuing machine and money orders. There was direct testimony that the machine was worth $55.00 (new). (T. 190) There was evidence that 500 blank money orders were recovered, none of which were filled in. (T.190) There was additional testimony that the *particeps criminis* attempted to "fill-in" some blanks abortively, and that only three were right and they were torn up. (T. 255)

It is respectfully submitted that the foregoing testimony is all of the evidence of any kind with respect to what, if any, value the machine and money orders actually had during the short time they were allegedly in the possession of the petitioner.

## Reasons For Granting The Writ

It is respectfully submitted that the Fifth Circuit Court of Appeals in its *Per Curiam* opinion of July 17th, 1970, has approved the conviction of the Petitioner Dudley for a felony, which said approval has implicitly had the effect of denying to Dudley his right to a *complete* trial by a jury of his peers. The Fifth Circuit dismissed the Petitioner's contention summarily, simply stating that any omissions in the charge of the District Court were not only proper but also that nothing could be found therein which could be considered "plain error" under Rule 52 (b), *Federal Rules of Criminal Procedure*.

We contend that this action by the District Court and the Fifth Circuit Court of Appeals could well herald the beginning of a gentle but continuing erosion of the inalienable right of all persons accused of a crime to a trial by jury, wherein the government has the burden of proving *every* element of the offense charged, and a jury is the final arbiter as to whether or not the government has met its burden.

The precise point that your Petitioner is trying to make was stated precisely and unequivocally in *United States v. Kramer*, 289 F.2d. 909 (1960), wherein the Second Circuit Court of Appeals said:

> "Although in contrast to 18 U.S.C. Secs. 2314 and 2315, the Section of the Criminal Code here in question does not

make value in excess of a certain figure, an element of the crime but rather a fact going only to the degree of punishment, *we assume that the Sixth Amendment entitles a defendant to have that fact determined by the jury rather than by the sentencing judge* . . .

*The judge should instruct the jury to find whether Kramer is guilty of the offense charged and, if so, whether at any time when Kramer received or was concealing or retaining the stolen property with intent to convert it to his own use and knowing it to have been stolen, the property as a whole in the condition in which it had been placed had a value of $100." (emphasis added)*

The Fifth Circuit Court of Appeals, itself, has previously not only cited the *Kramer* case, supra, with approval, but also has directly approved the requirement of having the jury fix the value of the stolen property in question. We quote in part from *Jalbert v. United States*, 275 F.2d. 125 (1967) wherein that court said:

"We approve the method used in submitting the issue of value to the jury. The *forms of verdict* provided for the jury called for a finding on the guilt or innocence of each defendant on each count *and for a separate finding on whether the value of the property involved was more or less than $100. The question of value in this kind of case deals with punishment and not with guilt." (emphasis added)*

To the very same effect, see also *United States v. Ciongoli*, 358 F.2d. 439 (1966).

In other words, value was an essential element in this prosecution, to be proved like any other necessary ingredient, the only distinction being that it relates to punishment rather than to guilt or innocence *per se*.

Clearly, where an essential element of proof, such as value, (See *Stevens v. United States*, 10th Cir., 297 F.2d. 664) is not proved strongly, a trial judge's failure to make it clear that the jury must find the element present before a conviction can be

rendered requires a reversal, even though the defendant makes no point of the omission. In other words, even where sufficient evidence of a material ingredient is adduced by the government so as to make a jury issue, the trial judge *must* apprise the jury of what the elements are and then, under the Sixth Amendment, allow *them* to determine whether or not they have been proved. See *Barry v. United States*, 287 F.2d. 340 (1961), and *Byrd v. United States*, 342 F.2d. 939 (1965).

Should this learned court hold otherwise than as Petitioner herein urges, it will have tacitly approved a procedure wherein a trial court by its actions and omissions took over the question of determining the grade of an offense to itself, and thereby denied an accused his full right to a jury trial under the code section, he was charged with violating. Every proceeding where an individual's rights under the Sixth Amendment are diminished, whether by intention or inadvertence, is one which must be reviewed and the error corrected.

**Conclusion**

For the reason stated, it is submitted the Petition For Writ of Certiorari in this case should be granted.

Respectfully,

PARKER, WILKINSON & MONTGOMERY
ATTORNEYS, PROFESSIONAL ASSOCIATION

By: _____
ARTHUR PARKER

_____
J. LOUIS WILKINSON
Attorneys for Petitioner

STATE OF ALABAMA:
JEFFERSON COUNTY:

**AFFIDAVIT OF SERVICE**

I, Arthur Parker, do depose and say that I have this the day of , 1970, mailed a copy of the foregoing petition to the Honorable Erwin N. Griswold, Solicitor General of the United States to his office located at Room 5143, U. S. Department of Justice, Justice Building, Washington, D. C.

PARKER, WILKINSON & MONTGOMERY,
ATTORNEYS, PROFESSIONAL ASSOCIATION

By: _____

**ARTHUR PARKER**
**Attorney for Petitioner**

Executed before me on this the__ day of _____, 1970.

_____

**NOTARY PUBLIC**

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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No. 28684
Summary Calendar

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UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

versus

JAMES DUDLEY,

*Defendant-Appellant.*

---

*Appeal from the United States District Court for the Northern District of Alabama*

---

(July 17, 1970)

---

Before GEWIN, GOLDBERG and DYER,
Circuit Judges.

PER CURIAM: James Dudley, appellant herein, was charged in a single count indictment under 18 U.S.C.A. 641

with receiving and concealing stolen United States postal money orders and a stolen money order issuing machine. Dudley was convicted by a jury and sentenced to three years imprisonment. He appeals, and we affirm.

Dudley submits a triumvirate of reasons for reversal, all of which relate to alleged omissions in the court's instructions to the jury. At trial Dudley did not make these objections to the charge or request instructions concerning these issues as required by Rule 30, Fed. R. Crim. P. We have nevertheless carefully reviewed each allegation of error raised by Dudley and find that in each case either a proper instruction was in fact given or its omission was, under the circumstances, entirely proper. Certainly, we have found nothing which could be considered "plain error" under Rule 52(b), Fed. R. Crim. P. Accordingly, the judgment of the trial court is

AFFIRMED.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1970

---

No. 28684
Summary Calendar

D. C. Docket No. CR 69–170–S

UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*

versus

JAMES DUDLEY,
*Defendant-Appelant.*

*Appeal from the United States District Court for the Northern District of Alabama*

Before GEWIN, GOLDBERG and DYER
Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Alabama, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It isnowhere ordered and adjudged by this Court that the judgment of the said Distrtict Court in this cause be, and the same is hereby,

AFFIRMED.

July 17, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

No. 28684
Summary Calendar

---

UNITED STATES OF AMERICA,

*Plaintiff-Appellee,*

versus

JAMES DUDLEY,

*Defendant-Appelant.*

---

*Appeal from the United States District Court for the Northern District of Alabama*

---

(August 11, 1970)

ON PETITION FOR REHEARING

Before GEWIN, GOLDBERG and DYER, Circuit Judges.

PER CURIAM: IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby

DENIED.

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FILED
OCT 13 1970
E. ROBERT SEAVER, CLERK

No. 676

# In the Supreme Court of the United States

OCTOBER TERM, 1970

JAMES DUDLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
*Solicitor General,*

WILL WILSON,
*Assistant Attorney General,*

BEATRICE ROSENBERG,
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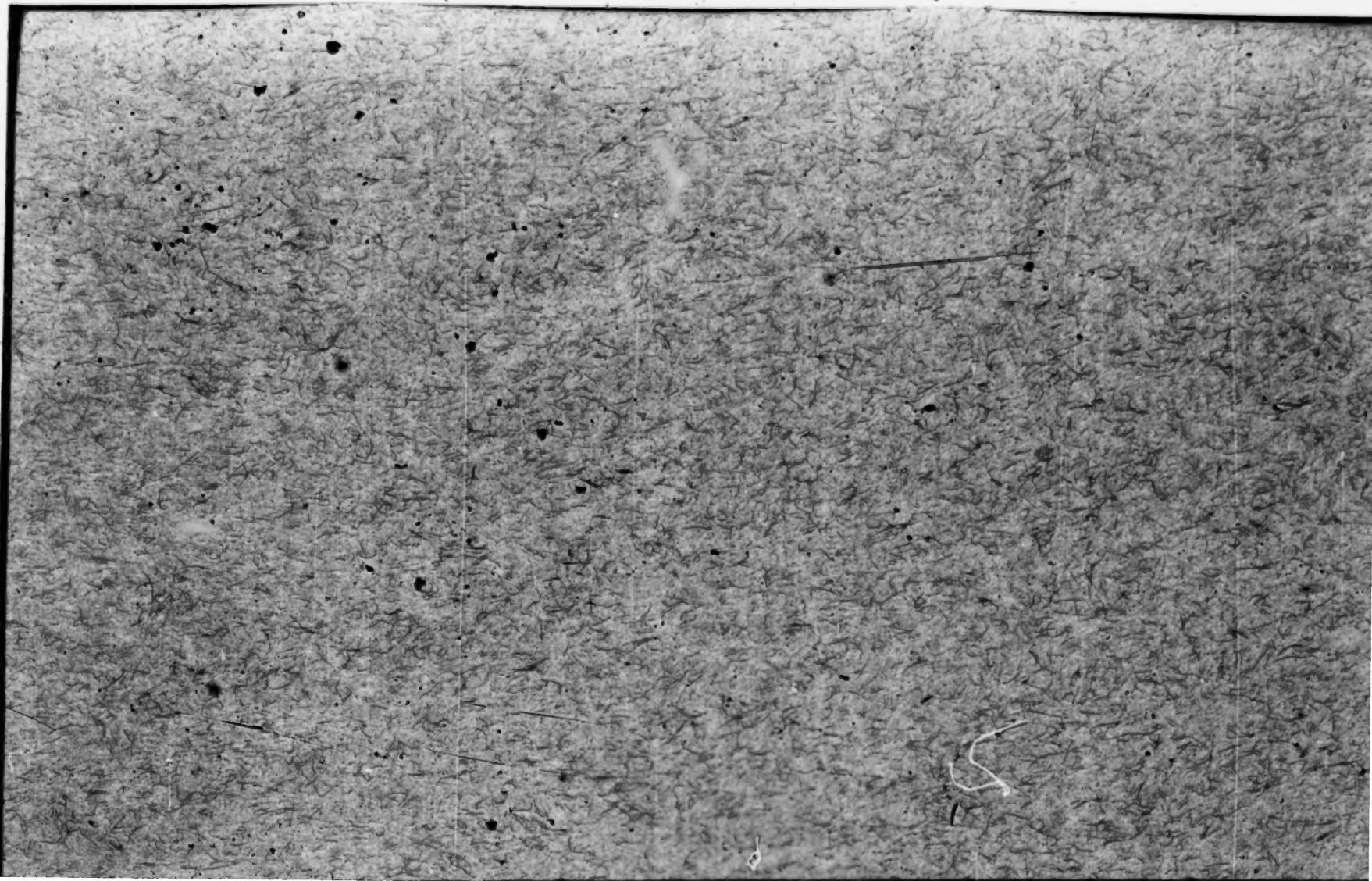

# In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 676

JAMES DUDLEY, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A2) is not yet reported.

### JURISDICTION

The judgment of the court of appeals (Pet. App. A3) was entered on July 17, 1970. A petition for rehearing was denied on August 11, 1970. The petition for a writ of certiorari was filed on September 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).



406-444—70

## QUESTION PRESENTED

Whether the court committed plain error in omitting from its charge an instruction requiring the jury to determine the value of stolen government property, where the stolen property was clearly worth more than $100 and petitioner made no request for such an instruction.

## STATEMENT

Petitioner was convicted after trial by jury in the Northern District of Alabama, of receiving and concealing stolen government property of a value in excess of one hundred dollars (approximately five hundred blank postal money orders and a postal money order issuing machine) in violation of 18 U.S.C. 641. He was sentenced to three years' imprisonment. The statute limits the penalty to one year's imprisonment and a $1,000 fine if the value of the stolen property is not in excess of one hundred dollars; otherwise a penalty of up to ten years' imprisonment and a fine of up to $10,000 may be imposed.

There was evidence that the machine itself had a value of $55.00 (A. 190);[1] that each of the blank money orders could be issued by the machine for a value of up to $100 (A. 190–191); and that, in petitioner's presence, the machine had been tested and three money orders had been "made" correctly (A. 255), one for $95 (A. 115) and the others for an unspecified amount.[2] Petitioner raised no issue at

[1] "A." refers to the appendix in the court of appeals, a copy of which is being lodged with this brief.

[2] After being "made" correctly, the three money orders were destroyed (A. 255).

trial concerning the value of the stolen property. His sole defense was that he neither participated in the theft of the machine and money orders nor had any knowledge that the stolen property was in a back room of the house next door until his arrest. Both petitioner and his wife took the stand to deny conflicting testimony of government witnesses (A. 265–269, 279–287).

Petitioner requested no instruction concerning value. He objected only to that part of the court's charge which embodied the "possession of recently stolen property" inference (A. 308–309, 326).

## ARGUMENT

Contrary to petitioner's assertion (Pet. 5), this is not a case where the evidence concerning an essential element of the offense "was not strong." Compare *Barry* v. *United States*, 287 F. 2d 340, 342 (C.A.D.C.). The value of blank money orders, when stolen, is not determined by "the nominal value of pieces of paper," but rather by "the amount the goods may bring to the thief." *Churder* v. *United States*, 387 F. 2d 825, 833 (C.A. 8). Here, each of the money orders could have been validated for up to $100, and petitioner and his cohorts possessed a stolen machine to validate them. The total value of the stolen property was thus well in excess of $100. *Montgomery* v. *United States*, 403 F. 2d 605, 610 (C.A. 8), certiorari denied, 396 U.S. 859; *Jalbert* v. *United States*, 375 F. 2d 125, 126 (C.A. 5), certiorari denied, 389 U.S. 899; see also *United States* v. *Ciongoli*, 358 F. 2d 439, 441 (C.A. 3); *United States* v. *Kramer*, 289 F. 2d 909,

921 (C.A. 2). In these circumstances, it was entirely appropriate for the court to pass on the question of value, rather than send it to the jury. Clearly, where no request is made by petitioner for such an instruction, and there is no objection in this regard to the charge given, the omission of an instruction on an uncontested and clearly established element cannot be considered to be plain error resulting in "a clear miscarriage of justice" or causing the "deprivation of a substantial right." *United States* v. *Urbana,* 412 F. 2d 1081, 1083 (C.A. 5), petition for certiorari pending, No. 199, this Term; see also *United States* v. *Bard,* 408 F. 2d 347, 348 (C.A. 6), certiorari denied, 396 U.S. 855; *United States* v. *Schmidt,* 376 F. 2d 751, 753 (C.A. 4), certiorari denied, 389 U.S. 884; *United States* v. *Salliey,* 360 F. 2d 699, 702–703 (C.A. 4).

## CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
*Solicitor General.*
WILL WILSON,
*Assistant Attorney General.*
BEATRICE ROSENBERG,
MARSHALL TAMOR GOLDING,
*Attorneys.*

OCTOBER 1970.

U.S. GOVERNMENT PRINTING OFFICE: 1970